In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

UNITED STATES, PETITIONER

v.

LEHIGH VALLEY RAILROAD COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above case on March 14, 1956.

OPINION BELOW

The opinion of the Court of Claims dated November 8, 1955, Appendix, *infra*, p. 7, is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on March 14, 1956, Appendix, *infra*, p. 9. On January 26 and March 2, 1956, the time for filing a petition for a writ of certiorari was extended by the Chief Justice to and including April

6, 1956, Appendix, *infra*, pp. 9-10.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the court below erred in holding that the expiration of the two-year limitation period of Section 16(3) of the Interstate Commerce Act, while not barring suits by common carriers against the United States, nonetheless precluded referral to the Interstate Commerce Commission for a determination as to the reasonableness of the tariff rates demanded by the carriers, thus preventing the Government from establishing the unreasonableness of those tariff rates as a complete defense to the suits.

2. Whether the high, first-class tariff rates on explosive and incendiary bombs, which are intended to reimburse carriers for the heavy and

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[1] The opinion of the Court of Claims, entered on November 8, 1955, concludes with the statement "Entry of judgment is suspended pending the filing of a stipulation by the parties showing the amount due plaintiff." (R. 19; Appendix, *infra*, p. 8.) In view of this wording, we believe that the time for filing a petition for certiorari should be computed not from the date of the opinion but rather from the date of entry of final judgment. See Memorandum for the United States in Response to Brief in Opposition filed in *United States of America* v. *Paul Tanner*, No. 280, this Term, pp. 3-10. Certiorari was denied in *Tanner* (on October 10, 1955), 350 U.S. 842, without any indication by this Court as to whether that petition, filed within 90 days of the entry of final judgment but not within 90 days after the opinion, was timely. As a precautionary matter, therefore, we are filing this petition within time, as extended, from the date of the opinion below as well as within time from the date of final judgment.

unusual transportation expenses resulting from the necessity that such bombs be carried in accordance with the Interstate Commerce Commission Regulations on "Explosives and Other Dangerous Articles," apply to steel bomb cases when these cases are filled with non-incendiary, non-explosive, and non-hazardous material and are *not* subject to the Regulations.

STATUTE INVOLVED

The Interstate Commerce Act, § 16(3) (24 Stat. 384, as amended, 49 U.S.C. 16(3)), provides in pertinent part:

> (a) All actions at law by carriers subject to this part for recovery of their charges, or any part thereof, shall be begun within two years from the time the cause of action accrues, and not after.
>
> (b) All complaints against carriers subject to this part for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subdivision (d).
>
> (c) For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers subject to this part within two years from the time the cause of action accrues, and not after, subject to subdivision (d), except that if claim for the overcharge has been presented in writing to the carrier within the two-year period of limi-

tation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

(d) If on or before expiration of the two-year period of limitation in subdivision (b) or of the two-year period of limitation in subdivision (c) a carrier subject to this part begins action under subdivision (a) for recovery of charges in respect of the same transportation service, or, without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety days from the time such action is begun or such charges are collected by the carrier.

(e) The cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after.

STATEMENT

This action was brought against the United States in the Court of Claims in 1954 by respondent Lehigh Valley Railroad Company to recover the difference between tariff rates actually paid and those allegedly applicable to certain Government shipments of steel bomb cases filled with Napalm gel (R. 1-3, 7). Some of these shipments were made as early as 1942 (R. 1).

The Court of Claims, stating that "[t]his case presents the same questions which the court considered and answered in *Union Pacific Railroad Company* v. *United States*, 125 C. Cls. 390, and *The Western Pacific Railroad Company* v. *United States*, No. 42-54, decided June 7, 1955," granted respondent's motion for summary judgment "on the basis" of those decisions. Judgment for $204,680.51 in favor of respondent was entered on March 14, 1956 (R. 21; Appendix, *infra*, p. 9). Chief Judge Jones and Judge Madden dissented.

REASONS FOR GRANTING THE WRIT

The issues presented by this case are, as the opinion of the court below expressly acknowledges, the same as those in the *Western Pacific* case, in which this Court granted a petition for a writ of certiorari on January 23, 1956 (No. 559, Oct. T., 1955), 350 U.S. 953.[2] And since the Court of Claims' disposition of these issues was based on its holdings in *Western Pacific*, the judgment here is, we believe, erroneous for the reasons set out in the petition in *Western Pacific*, to which the Court is respectfully referred. If this Court concludes that the *Western Pacific* case was incorrectly decided by the court below, it is plain that respondent here should no more be entitled to its $204,680 judgment than would the various respondents in

[2] Related issues are presented in *United States* v. *Chesapeake and Ohio Railway Company*, 224 F. 2d 443 (C.A. 4), in which this Court also granted a petition for a writ of certiorari on January 23, 1956 (No. 560, Oct. T., 1955), 350 U.S. 953.

Western Pacific to the judgments awarded them by the court below.

CONCLUSION

The Government can preserve its rights in the instant case only by filing this petition for a writ of certiorari. However, in view of the identity of issues, the Court may deem it appropriate, instead of granting certiorari at this time, to withhold action on the instant petition until it issues its opinions in the *Western Pacific* and related cases.

SIMON E. SOBELOFF,
Solicitor General.
WARREN E. BURGER,
Assistant Attorney General.
MELVIN RICHTER,
MORTON HOLLANDER,
Attorneys.

MARCH 1956

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 30-54

(Decided November 8, 1955)

LEHIGH VALLEY RAILROAD COMPANY

v.

THE UNITED STATES

Mr. Richard D. Lalanne for the plaintiff.

Mr. Martin E. Rendelman, with whom was *Mr. Assistant Attorney General Warren E. Burger*, for the defendant.

ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND FOR SUMMARY JUDGMENT DISMISSING THE COUNTERCLAIM

LARAMORE, *Judge*, delivered the opinion of the court:

This case presents the same questions which the court considered and answered in *Union Pacific Railroad Company* v. *United States*, 125 C. Cls. 390, and *The Western Pacific Railroad Company* v. *United States*, No. 42-54, decided June 7, 1955. The plaintiff here has moved for summary judgment on the basis of those decisions. A reconsideration of those questions leads us to the same conclusion, and on the basis of the above decisions plaintiff's motion for summary judgment is granted and defendant's counterclaim is dismissed.

Entry of judgment is suspended pending the filing of a stipulation by the parties showing the amount due plaintiff.

It is so ordered.

WHITAKER, *Judge,* and LITTLETON, *Judge,* concur.

MADDEN, *Judge,* and JONES, *Chief Judge,* dissent.

IN THE UNITED STATES COURT OF CLAIMS

No. 30-54

LEHIGH VALLEY RAILROAD COMPANY

v.

THE UNITED STATES

ORDER

On November 8, 1955, the court rendered an opinion holding that plaintiff was entitled to recover but suspended the entry of judgment pending the filing of a stipulation by the parties showing the amount due plaintiff in accordance with the opinion of the court.

On March 9, 1956, said stipulation was filed, signed on behalf of plaintiff by its attorney of record and on behalf of the defendant by Assistant Attorney General Warren E. Burger, in which it is stated that there is due plaintiff the sum of $204,680.51.

NOW, THEREFORE, IT IS ORDERED this fourteenth day of March, 1956, that judgment be and same is entered for plaintiff in the sum of two hundred four thousand six hundred eighty dollars and fifty-one cents ($204,680.51).

BY THE COURT

MARVIN JONES,
Chief Judge.

SUPREME COURT OF THE UNITED STATES

No. —, OCTOBER TERM, 1955

THE UNITED STATES, PETITIONER

vs.

LEHIGH VALLEY RAILROAD COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 7, 1956.

(Sgd.) EARL WARREN,
Chief Justice of the United States.

Dated this 26th day of January, 1956.

SUPREME COURT OF THE UNITED STATES

No. —, October Term, 1955

The United States, petitioner

vs.

Lehigh Valley Railroad Company

Order Extending Time to File Petition for Writ of Certiorari

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 6, 1956.

(Sgd.) Earl Warren,
Chief Justice of the United States.

Dated this 2nd day of March, 1956.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1956 373884 1100

No. 54. UNITED STATES *v.* LEHIGH VALLEY RAILROAD CO. On petition for writ of certiorari to the Court of Claims. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the court below is reversed and the case is remanded to the Court of Claims for further proceedings not inconsistent with the opinion of this Court in *United States* v. *Western Pacific R. Co.*, 352 U. S. 59.

Simon E. Sobeloff, then Solicitor General, *Assistant Attorney General Burger*, *Melvin Richter* and *Morton Hollander* for the United States. Reported below: 133 Ct. Cl. 160.